

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
JIMMY GENE MILLER, JR.,  
Defendant.

NO. 2:21-cr-00218-RAJ

**ORDER ON DEFENDANT'S MOTION  
TO SUPPRESS EVIDENCE AND FOR  
*FRANKS* HEARING**

## I. INTRODUCTION

THIS MATTER has come before the Court upon Defendant Jimmy Gene Miller's Motion to Suppress Evidence and for a *Franks* hearing. Dkt. 35. Having considered the motion, the government's response (Dkt. 53), defendant's reply (Dkt. 64), the government's surreply (Dkt. 79), and the files and pleadings herein, the Court **DENIES** the motion. The parties are well aware of the details of the investigation and the Court will refrain from detailing the full history and only reference the facts of the investigation as necessary for this determination.

## II. DISCUSSION

The defendant seeks a *Franks v. Delaware*, 438 U.S. 154 (1978) hearing and suppression of all evidence contending that all evidence seized pursuant to multiple search warrants executed on his residence and vehicles, and the fruits of the searches, were illegally obtained.

1        Specifically, the defendant contends the following serve as the basis for the  
 2 suppression of evidence and *Franks* hearing:

- 3        1. That there was no probable cause for the issuance of the pen/trap  
         warrant MJ21-497, 9/7/21.
- 4        2. The October 6 search of the breezeway of the defendant's apartment  
         was unlawful and the failure to disclose the results of this search to  
         the magistrate judge in subsequent search warrants was improper.
- 5        3. That the second pen-trap warrant MJ21-563, 10/20/21, was based on  
         intentionally or recklessly proffered evidence.
- 6        4. The warrant applications to conduct a canine sniff outside of  
         Apartment W8, MJ21-564 and MJ21-579, were based on  
         intentionally or recklessly proffered evidence.
- 7        5. The warrant applications for the Kent apartment and person, MJ21-  
         602, and the anticipatory warrant for Miller's vehicle space #31,  
         MJ21-617, were based on intentionally or recklessly proffered  
         evidence.
- 8        6. The November seizure of the defendant and warrantless search of his  
         vehicle was illegal.

19        In addition to the foregoing specific contentions, the defendant raises a myriad of  
 20 issues that he believes supports the bases for his motions. In sum, the defendant contends  
 21 that absent these lies, other inconsistencies and omissions, warrants should not have  
 22 issued.

23        Before undertaking ruling on the defendant's motion, the Court will address issues  
 24 raised by the parties in the defendant's reply (Dkt. 64) and the government's surreply  
 25 (Dkt 79).

26        In his reply, the defendant raises several factual contentions not raised in his  
 27 suppression motion. The government contends this is improper and asks this Court to  
 28 refuse to accept such argument. *United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d

1 1117, 1127 (C.D. Cal. 2000). The Court generally agrees that it is improper for a moving  
 2 party to raise issues never raised in his suppression motion. The Court will, however,  
 3 consider them as the government has also advanced the declaration of FBI Special Agent  
 4 Shawna McCann, which the Court will also consider under the authority of  
 5 *Messerschmidt v. Miller*, 565 U.S. 535, 547 (2012) which authorizes extrinsic evidence in  
 6 circumstances as now before this Court.

7           **A. GPS Warrant to Track Miller's Cell Phone, GPS Warrant/MJ21-497**

8           The defendant contends the search warrant application for MJ21-497 failed to  
 9 state probable cause because affiant FBI Special Agent McCann relied almost exclusively  
 10 upon the allegations of CS1 and CS2, whom he asserts provided uncorroborated  
 11 information which was used to support issuance of the warrant.

12           The information relied upon included CS1's contention that he saw Jimmy Miller  
 13 Jr., brandishing a firearm and that he was using phone number (206) 530-7878. Dkt. 36,  
 14 MJ21-497, p. 7. The information relied upon included CS2's statement that Jimmy  
 15 Miller Jr., was carrying a firearm and was assaulting and shooting at people. Dkt. 36,  
 16 MJ21-497, p. 7. CS2 also provided the same telephone number for Miller as CS1. The  
 17 thrust of this challenge is that the basis of either CS1's or CS2's knowledge that Miller  
 18 possessed or brandished firearms is nowhere to be found in the affidavit. In other words,  
 19 a challenge to the reliability of unsupported conclusions which should not support  
 20 probable cause.

21           The second component of the challenge is that it references an August 11, 2021,  
 22 police report regarding the recovery of Miller's stolen car. The claimed inaccuracy is  
 23 that the report only references that Miller was the victim of the "theft of car parts" rather  
 24 than the theft of his car. The claimed importance of this assertion is that the omission  
 25 that Miller's car had been stolen is material to subsequent warrant applications where  
 26 there is reference that Miller's use of rental vehicles was to evade law enforcement  
 27 detection. Dkt. 35, at 5.

1       Other challenges to the warrant include the omission that Miller remained  
2 employed full-time with a stable residence; that no information was provided to support  
3 the reference to Miller previously being associated with the East Union Street Hustler  
4 street gang; and that the representation that investigators had been unable to determine  
5 Miller's residence and current vehicle(s) was false in that Miller's federal probation  
6 officer already knew this information.

7       The government counters the defendant's attacks on the two confidential sources  
8 by identifying their history and reliability. According to the government, CS1 had told a  
9 detective with the Seattle Police Department that he had seen Miller brandishing a  
10 firearm and that his telephone number was (206) 530-7878. CS1 was represented as a  
11 paid informant with the Seattle Police Department who had been working with law  
12 enforcement for more than five years and had not been closed for cause by any other law  
13 enforcement agency. His identity was known to law enforcement, and he had previously  
14 provided credible and reliable information in the past on other investigations that led to  
15 charges and seizures of narcotics and firearms. The SPD detective had relayed this  
16 information to the affiant (SA McCann). Dkt. 53, at 3.

17       The government represents that CS2 had also provided information that Miller  
18 was carrying a firearm and was assaulting and shooting at people. CS2 provided the  
19 same telephone number for Miller as provided by CS1. According to the government,  
20 CS2 was known to law enforcement, was paid as a Seattle Police Department informant,  
21 and had provided credible and reliable information on other investigations. Dkt. 53, at 4.

22       The government also asserts the information provided by the confidential sources  
23 was not restricted. Upon receipt of this information agents learned Miller had been the  
24 victim of a vehicle prow, and the police report documenting the same confirmed his  
25 telephone number to be the same as provided by both of the confidential sources.

26       Agents also received information that Officer Huber provided information to SA  
27 McCann that he was familiar with Miller from prior investigations and identified Miller  
28 as a member of the East Union Street Hustler Gang.

1       According to the government, the information from the confidential sources,  
 2 confirmation of Miller's telephone, and association with a street gang provided the basis  
 3 for the investigation of Miller's involvement in firearms violations. All of these facts  
 4 were included in the application for the issuance of the search warrant.

5       The government additionally counters the defense claims regarding the absence in  
 6 the search warrant application about the claimed lack of knowledge of SA McCann  
 7 concerning Miller's residence and place of employment. The defense claims about what  
 8 was communicated to whom and when appears to be unsupported by any facts before this  
 9 Court. Nor is there any record in the chronological reports of the Probation Officer to  
 10 support the defendant's supposition.

11       The Court finds the defendant's arguments on this probable cause challenge  
 12 unpersuasive for several reasons. First, the two informants had provided in the past  
 13 credible and reliable information on other investigations to law enforcement officers.  
 14 This is unrebuted. Moreover, these informants each provided the same telephone  
 15 number for the defendant that was confirmed by law enforcement agents. There is no  
 16 evidence presented to suggest the two informants knew each other or had communicated  
 17 about the defendant's use of the telephone number they appear to have independently  
 18 provided to law enforcement. Nor is there any information to suggest that law  
 19 enforcement officers exchanged any information between the respective confidential  
 20 sources of information.

21       SA McCann also provided to the magistrate judge detailed criminal histories for  
 22 both confidential sources. Dkt. 36, MJ21-497, p. 7.

23       The warrant application also included Miller's gang association, prior  
 24 convictions for firearms and drug trafficking crimes, and his admission to violating the  
 25 terms of his supervised release. These unrebuted statements combined with the agent's  
 26 opinions adequately justified the issuance of the warrant.

27       It is patently obvious that the application did not reflect the basis for the  
 28 knowledge, but when considered with the totality of information before the magistrate, it

1 was sufficient for a finding of probable cause. Consequently, there is no basis to exclude  
 2 or suppress the evidence derived from the issued warrant. For these reasons, the  
 3 defendant's motion on this warrant is denied.

4       The defendant also contends SA McCann "omitted material information" about  
 5 CS2's criminal history. Dkt. 64, at 11. Specifically, the claim is that Agent McCann did  
 6 not identify the extent of CS2's criminal history or that CS2 had pending identity theft  
 7 charges at the time of the initial warrant application.

8       The application clearly indicates that CS2 had extensive criminal history with  
 9 multiple convictions and detailed the specifics of some of the history. While more detail  
 10 could have been provided, there is no requirement that the applicant must detail the  
 11 entirety of every drop of criminal wrongdoing of a cooperating witness. Acknowledging  
 12 more could have been provided, the defendant does not present sufficient facts that had  
 13 such detail been provided, it would plausibly have changed the probable-cause  
 14 determination.

15       In light of the foregoing finding, the record does not reflect that SA McCann  
 16 recklessly or intentionally included any false material in the search warrant application.  
 17 No *Franks* hearing is necessary or justified upon the record before this Court on this  
 18 warrant.

19           **B. GPS Renewal Warrant MJ21-563 and Canine Sniff Warrant MJ21-564**

20       The defendant contends the renewal of the pen/trap warrant repeated the same  
 21 "information and misinformation" from the original application claiming the defendant  
 22 was "trafficking/distributing cocaine." Dkt. 35, at 9. In addition, the defense contends  
 23 the observations of law enforcement fell short of probable cause. The claims by the  
 24 defendant argue that the "only alleged drug activity observed was from September 7 to  
 25 October 21, with Miller visiting with multiple females at their residences" and the general  
 26 observation about drug trafficker practices and Miller's contact with an alleged drug  
 27 trafficker.

1       The government responds to the defendant's claims with several counterarguments  
 2 the Court finds persuasive. These include that the affidavits contained information that  
 3 two confidential informants had reported to law enforcement that Miller was  
 4 trafficking/distributing cocaine; that Miller's behavior with respect to his vehicles such as  
 5 switching and airing out rental vehicles was consistent with someone seeking to hide  
 6 drug trafficking activity; and that Miller was traveling regularly to three or four different  
 7 residences and that this was indicative of someone visiting stash houses or distributing  
 8 drugs or proceeds.

9       The affidavit included statements about Miller's conduct that had been gained  
 10 from physical and electronic surveillance including his communication with a felon/gang  
 11 member D.T., Miller's driving of rental vehicles, engaging in behavior consistent with  
 12 attempting to conceal drug trafficking activity, and his driving to various destinations not  
 13 his own during the morning and early afternoon.

14       The totality of evidence presented is sufficient to establish probable cause. While  
 15 each of these observations may be explained or challenged, that is not the standard for  
 16 assessing probable cause. As stated in *United States v. Ayers*, 924 F.2d 1468, 1478 (9th  
 17 Cir. 1991), a reviewing court must decide solely whether, under the totality of the  
 18 circumstances, the issuing magistrate had a "substantial basis for concluding that the  
 19 affidavit in support of the warrant established probable cause." In a doubtful case, which  
 20 this case is not, preference is to be given to upholding the validity of a search warrant.  
 21 *United States v. Calabrese*, 825 F.2d 1342, 1349 (9th Cir. 1987). In short, the  
 22 defendant's challenge of these warrants falls short.

23       **C. Magistrate Judge McCandlis' Authorization of Warrant to Search  
 24 Miller's Person and Kent Apartment**

25       Magistrate Judge McCandlis authorized search warrants for Miller's person and  
 26 Kent apartment. Miller contends the affidavit lacked sufficient probable cause and  
 27 likewise challenges K9 Devon's positive alerts at Miller's door and vehicle as "fruit of  
 28 the poisonous tree."

1       The government refutes this challenge with citation to a host of facts that  
2 supported Magistrate Judge McCandlis' authorization for the issuance of the search  
3 warrants. In addition to information from the prior warrants, the agents had spoken with  
4 a third confidential source who stated that the felon/gang member D.T. had continued to  
5 be associated with gang members (the same D.T. Miller had previously been seen  
6 associating with), that Miller had engaged in activity on November 3 consistent with drug  
7 trafficking, that agents had not observed Miller at any legitimate place of employment or  
8 traveling in patterns indicative of employment, and the variety of rental vehicles Miller  
9 had been observed to be driving. While the interpretation of these facts can be  
10 challenged, they nonetheless established probable cause when considering them in light  
11 of the other statements tendered to Magistrate Judge McCandlis.

12       The defendant also challenges the November 3rd positive alerts by K9 Devon at  
13 the exterior door of Miller's apartment and vehicle he had been seen driving earlier that  
14 night. Specifically, he suggests that because this was the dog's first deployment, the dog  
15 alert was per se unreliable. Since the first deployment fact was not communicated in the  
16 affidavit, the defense argues SA McCann intentionally withheld this information from the  
17 Court.

18       The Court disagrees with the defendant. The mere fact that a drug detection  
19 canine is new to the force or has only recently been certified does not make the dog's  
20 sniffs constitutionally invalid. As long as the government can establish the dog's training  
21 and experience as a drug-detection dog, there is no need for further evidence of  
22 reliability. *United States v. Robinson*, 390 F.3d 853, 874 (6th Cir. 2004); *United States v.*  
23 *Kennedy*, 131 F.3d 1371, 1376-77 (10th Cir. 1997).

24       The affidavit submitted by SA McCann stated that the canine handler and K9  
25 Devon were trained and qualified, and described the type of narcotics the K9 was trained  
26 to detect. There is no evidence that SA McCann attempted to withhold information from  
27 the Court regarding the K9's experience. The Court does not consider the after-the-fact  
28 explanations by the government and what they mistakenly failed to include in the final

1 warrant packet. The information, while submitted in summary fashion, clearly referenced  
 2 the facts the agent was aware of regarding the certification and qualifications of the K9.  
 3 Since the K9 did produce a positive sniff alert, that was sufficient probable cause to  
 4 search for drugs. *United States v. Cedano-Arellano*, 332 F.3d 568, 573 (9th Cir. 2003).

5 The Court rejects the defense suggestion that the mere fact this was K9 Devon's  
 6 first detection as inherently unreliable. The Court is unaware of any formalized  
 7 requirement that a drug dog's reliability beyond the statement that it has been trained and  
 8 certified to detect drugs is required to be detailed in a search warrant affidavit. The  
 9 defense suggestion that a "rookie dog team" should be considered "unreliable" until it has  
 10 several positive real-life deployments would create an untenable outcome. This would  
 11 create a presumption of unreliability without a factual basis to support the same. It would  
 12 also suggest that the first search of every "rookie dog team" would presumably be invalid  
 13 because of the lack of experience in real time searches.

14 **D. The Impala Search Warrant Application MJ21-622**

15 The defendant repeats many of the arguments previously addressed by this Court  
 16 to challenge this warrant. These references include the challenges regarding the agents'  
 17 claimed misstatements about Miller's employment and lifestyle and narcotics detection  
 18 K9 (Cisco) alerts. The defendant also contends the K9 was repeatedly influenced and  
 19 cued throughout the entire time by the dog's handler, Detective Lazarou. In addition, the  
 20 defense proffered expert Falco Jiminez regarding what constitutes accepted drug dog  
 21 training and deployment practices and standards.

22 In response, the government has indicated that some aspects of the deployment  
 23 could cast doubt on the reliability of the dog sniff. Dkt. 53, at 38. For these reasons, the  
 24 government does not rely upon the positive alert reported by Detective Lazarou when the  
 25 Court is considering whether sufficient probable cause existed to search the Impala. The  
 26 Court accepts this concession and excises the actions of Detective Lazarou in its analysis  
 27 and determination if probable cause existed independent of the dog sniff.

1       Excising the canine sniff facts from the search of the Impala does not change the  
 2 outcome. The balance of facts established probable cause to search the Impala. The  
 3 government makes this precise point. Magistrate Judge Michele L. Peterson issued an  
 4 anticipatory warrant based upon identical information without the dog sniff evidence.  
 5 This Court reaches the same conclusion and there was probable cause established to issue  
 6 the warrant and conduct the search.

7       **E. Search of the Rental Car**

8       Miller takes issue with the search of the rental car. That issue requires minimal  
 9 analysis from the Court due to the long line of cases that affirm and reaffirm the  
 10 automobile exception in conducting searches. The bottom line is that even if this Court  
 11 assumes there were defects in the Impala warrant, it is of little consequence because of  
 12 the automobile exception to the Fourth Amendment requirement. The officers were  
 13 permitted to stop the defendant's vehicle to execute the search of his person. The  
 14 affidavit contained facts that demonstrate the officers had reason to believe the stopped  
 15 vehicle contained contraband. Under these circumstances, if officers have probable cause  
 16 to think a lawfully stopped vehicle contains contraband or evidence, they are permitted to  
 17 conduct a warrantless search of any part of the car where it could be. *United States v.*  
 18 *Korte*, 918 F.3d 750, 755 (9th Cir. 2019).

19       In light of the facts, probable cause to search existed to search the vehicle well  
 20 before the canine sniff. This is evidenced by the fact that Magistrate Judge Peterson had  
 21 already issued the Anticipatory Vehicle Warrant before the dog sniff.

22       **F. Miller's Remaining Fourth Amendment Claims**

23           **1. October 6, 2021 Search of Breezeway**

24       The defendant contends that on October 6, 2021, without a search warrant, and at  
 25 the direction of SA McCann, Auburn Officer Shaub directed his drug detection K9 Axel  
 26 to conduct a sniff of a suspect's apartment door. According to the defendant, the fact of  
 27 this warrantless search was not disclosed to other judges who issued the subsequent  
 28

1 warrants. The defense posits that the fact this search was not divulged to the other judges  
 2 sheds light on the credibility of subsequent warrant applications. Dkt. 35, at 9. The  
 3 defendant relies upon an out of circuit opinion, *United States v. Whitaker*, 820 F.3d 849  
 4 (7th Cir. 2016), to support his argument. The Court begins this analysis observing that  
 5 the government did not rely upon any results of that dog sniff, so there are no fruits from  
 6 that sniff to suppress and this becomes a non-issue.

7 The Court declines to follow the defendant's request that this dog sniff affects the  
 8 credibility of subsequent warrants for a variety of reason. First, the extent of the dog  
 9 sniff was in the breezeway/hallway of the apartment building. A defendant has no  
 10 reasonable expectation of privacy in the common areas of one's apartment building.  
 11 *United States v. Nohara*, 3 F.3d 1239, 1241 (9th Cir. 1993). "The hallway of an  
 12 apartment building, as with the threshold of one's dwelling is a 'public' place for  
 13 purposes of interpreting the Fourth Amendment." *United States v. Calhoun*, 542 F.2d  
 14 1094, 1100 (9th Cir. 1976).

15 The limited extent of the dog sniff and the area in which it was undertaken did not  
 16 give rise to a search restricted by the Fourth Amendment or Ninth Circuit precedent.  
 17 More importantly, it would be improper for this Court to apply the exclusionary rule  
 18 given that the investigators never relied upon the results of that warrantless K9 sniff in  
 19 any search warrant affidavit. In addition, not only did investigators not rely upon that  
 20 sniff, but they also obtained a warrant for the subsequent K9 sniff. Consequently, there  
 21 was no illegal search to warrant any remedy from this Court.

22 In addition, the Court looks to the actual contentions of misconduct by the agent  
 23 claiming she did not disclose the subject K9 sniff in subsequent search warrant  
 24 applications. There are no facts before this Court that SA McCann did not include this  
 25 information in the affidavits to keep the magistrate judge in the dark. These claims fit  
 26 more under the category of surmise and speculation when compared to what is before this  
 27 Court. As proffered, it was the Assistant United States Attorney that directed the agent to  
 28 not include this information, not the agent acting with ill intent. The record suggests her

1 conduct was more closely aligned with avoiding taint as opposed to an effort to mislead  
 2 or recklessly engage in improper submission or omission of evidence.

3           **2. Miller's Detention Pending Acquisition of an Arrest  
 4           Warrant**

5           The defense contends that Miller was detained for hours until an arrest warrant  
 6 was obtained. The defense fails to reference the circumstances of the delay which was  
 7 attributed to his having difficulty breathing which warranted a response from the fire  
 8 department/EMS team. The search was delayed until this medical team could arrive.

9           In addition to the medical delay was the detainment of Miller for officer safety  
 10 until the search of his Kent apartment could be concluded the same morning. These  
 11 circumstances are compounded by the fact that after finding ammunition in the  
 12 defendant's Kent apartment, the detention was converted to an arrest. Last, the Probation  
 13 Office had obtained a warrant to arrest Miller for violating his supervised release  
 14 conditions.

15           All of these factors clearly indicate that Miller's arrest and detention were not only  
 16 lawful, but constitutional in light of the facts and circumstances.

17           **3. Examination/Search of Miller's Cell Phones**

18           The defense contends that during the stop on November 19, 2021, Miller was  
 19 removed from the Impala and handcuffed. Miller claims the officers opened the front  
 20 driver door, entered the car, removed his phones, examined them, placed them in a black  
 21 bag, walked away with the phones, re-examined them at the hood of a patrol car, and then  
 22 returned with the bag containing the phones and placed them on to the driver's seat. The  
 23 defense argues all of this was done without the benefit of a search warrant.

24           The contentions offered by the government clearly indicate no search of the  
 25 phones took place. It is undisputed the phones were removed from the vehicle.  
 26 However, what has been presented does not constitute an illegal search. Rather, it  
 27 appears at most that law enforcement officers removed the cell phones from the vehicle  
 28 and placed them in a signal blocking evidence bag to prevent either cell phone from

1 being remotely erased before a search warrant could be obtained. It appears that the  
 2 officers also removed the phones from the bag to photograph them for purposes of  
 3 describing the phones on the evidence log. There is no evidence that any of the  
 4 investigating agents or officers examined or attempted to search the contents of the  
 5 phones. Under these facts, there was no illegal search of the cell phones.

6       **G. Entitlement to a *Franks* Hearing**

7       The government contends this Court should deny the defendant's motion claiming,  
 8 first, he has failed to make a substantial showing that the investigating agents  
 9 intentionally or recklessly made false or misleading statements or omissions in support of  
 10 the warrant; and second, that the defendant has failed to establish that any such statement  
 11 or omission was material.

12       In *Franks v. Delaware*, the United States Supreme Court held that after a search  
 13 warrant has been issued, a defendant is entitled to an evidentiary hearing -- a "*Franks*  
 14 hearing" -- regarding the veracity of factual allegations in the search warrant affidavit if  
 15 (1) the defendant makes a "substantial preliminary showing" that the affiant knowingly  
 16 and intentionally or with reckless disregard for the truth included a false statement in the  
 17 warrant affidavit, and (2) the allegedly false statement is necessary to the finding of  
 18 probable cause. 438 U.S. 154, 155-156 (1978). The test also applies to material  
 19 omissions of fact. *DeMassa v. Nunez*, 747 F.2d 1283, 1293 (9th Cir. 1984), *on reh'g*, 770  
 20 F.2d 1505 (1985).

21       At this juncture, Miller is not expected to show clear proof at the pleading stage,  
 22 but rather he has the burden "to make a substantial showing that supports a finding of  
 23 intent or recklessness." *United States v. Gonzalez*, 412 F.3d 1102, 1111 (9th Cir. 2005),  
 24 *amended on denial of rehearing*, 437 F.3d 854.

25       The government summarizes the specifics of the agents' alleged actions that the  
 26 defendant claims support his justification for a *Franks* hearing. Dkt. 53, at 44-45. The  
 27 Court agrees with the government that the correct outcome is a denial of the motion. The  
 28 defendant's allegations of deliberate falsehood or recklessness appear to be premised

1 upon surmise, suspicion, and bare assertions of misconduct. The defendant has failed to  
 2 show substantially or otherwise any intentional or reckless misconduct by SA McCann to  
 3 warrant a *Franks* hearing. Not meeting the requirements as noted, the Court denies the  
 4 defendant's motion without a hearing.

5 In his reply brief, the defendant contends that the representation that Miller was  
 6 involved in a shooting on September 6, 2021, was proven to be untrue due to historical  
 7 cell site data provided by T-Mobile well before SA McCann sought the warrants for  
 8 Miller's apartment and Impala. Dkt. 64, at 9.

9 The government countered this contention with substantial and convincing  
 10 contrary evidence. The Call Detail Records only provided the historical location data for  
 11 Miller's phone. Based upon the record, these records did not provide the location of  
 12 Miller's phone, nor did they provide the location of Miller's phone in relation to the cell  
 13 towers. These records, according to the government, did not identify the servicing towers  
 14 when Miller's phone sent a text message or was not in use. Contrary to the defendant's  
 15 claim, the T-Mobile records provided on October 21 and November 16 did not contain  
 16 the data necessary to determine whether Miller's phone was located near the state  
 17 fairgrounds on September 6, 2021.

18 The T-Mobile data does not prove that the CS provided false information. The  
 19 Court references and agrees with the government response that the historical data did not  
 20 show a particular phone near the fairground on September 6, nor does it prove that he  
 21 was not at the fairgrounds on that day. Nor does it prove that Miller was not somehow  
 22 involved in the shooting. All to conclude, there is no persuasive evidence tendered to this  
 23 Court that SA McCann misled any magistrate judge about the historical cell data to  
 24 warrant a *Franks* hearing.

25 The defendant additionally raises a myriad of contentions about various  
 26 representations in SA McCann's affidavits. The Court will address each in turn.

27 ///

28 ///

1                   *a. Information about Miller's Employment Security Records*

2                 The defendant contends that "it is clear someone in the FBI received Miller's  
 3 Employment Security records by November 16, if not sooner." Dkt. 64, at 8. This  
 4 contention fails for several reasons. The defendant has failed to meet the materiality and  
 5 relevance component to challenge the probable cause determination. Moreover, Miller  
 6 fails to establish that anyone in law enforcement confirmed the information contained in  
 7 the records before November 19, 2021. More importantly, Miller fails to offer or proffer  
 8 any evidence that the investigators deliberately failed to provide SA McCann with any  
 9 analysis of or confirmation of the information in those records.

10                  *b. Information About Miller's Employment at Capitol Hill Location*

11                 The thrust of this contention is that an officer at the scene of Miller's arrest  
 12 "misinformed" SA McCann and provided "untrue" information about his interaction with  
 13 a female standing in front of the residence. Critical evidence in this case is the bodycam  
 14 video. Dkt. 64-3(BMV X6039B1BK). The government's representations of the  
 15 interaction with the female and an unknown man appear to be consistent with the content  
 16 of the video and description of statements by the officer. The characterization of her as  
 17 "uncooperative" was not unreasonable. Dkt. 79, at 11. The defendant's assessment that  
 18 the officer "misinformed" SA McCann is not supported by the evidence reflected in the  
 19 video.

20                  *c. Information Known to the Probation Office*

21                 The defendant suggests that law enforcement received information from the  
 22 Probation Office about Miller and that SA McCann intentionally omitted that information  
 23 from the affidavits. The government succinctly establishes this representation as untrue  
 24 when considering the combination of the sworn declaration of Task Force Officer Huber  
 25 and pointedly by the unredacted chronologies which illuminate that the Probation Office  
 26 did not provide information about Miller's current employment, income, or residence to  
 27 AUSA Lombardi or Officer Huber. Dkt. 53, at 5; Dkt. 53-3 ¶¶ 35-38; Dkt. 53-2.  
 28

1                   d. *Information Regarding K-9 Devon's Deployment History*

2         The defendant contends Detective Shaub provided misleading information in the  
 3 form of a “declaration suggesting Devon was reliable” despite never having been  
 4 deployed in the field before. Dkt. 64, at 16, 22-24. The record demonstrates the officer  
 5 outlined his own training as a canine handler and K9 Devon’s training and certifications.  
 6 The defendant cites no controlling caselaw or persuasive evidence establishing that a lack  
 7 of prior deployments renders a canine unreliable or a deficiency that must be disclosed to  
 8 a reviewing court. To the contrary the government has established that certification on its  
 9 own is enough to establish reliability. Dkt. 53, at 35-36.

10                  e. *Information Regarding Reliability of K9 Cisco Sniff*

11         This contention fails for lack of anything more than surmise on the defendant’s  
 12 part. Although the defendant contends that Detective Lazarou “knew” that the November  
 13 19 sniff of the Impala by K9 Cisco was unreliable, he provides no evidence to support his  
 14 claim that the detective knew yet failed to disclose that the alert was unreliable.

15         Moreover, Miller fails to provide any evidence to support the statement that the  
 16 “agents believed that without the K9 sniff there was no probable cause to search the  
 17 Impala.” Dkt. 64, at 23. What obviates this conclusion is that two days earlier,  
 18 Magistrate Judge Peterson had signed an anticipatory vehicle warrant based on the same  
 19 probable cause contained in the Impala warrant, minus the information about K9 Cisco’s  
 20 positive alert. The issuance of that warrant clarifies that the K9 sniff evidence was of  
 21 little significance to establishing probable cause to search.

23                  H. **Exclusionary Rule**

24         The government has advanced a variety of justifications to counter the defendant’s  
 25 motion including the exclusionary rule, the inevitable discovery doctrine, and the *Leon*  
 26 good faith exception. In light of the Court denying the defendant’s motion and *Franks*  
 27 hearing request, the Court need not address these issues.

28         ///

### III. CONCLUSION

For the foregoing reasons, the Defendant Jimmy Gene Miller's Motion to Suppress and for a *Franks* Hearing is **DENIED**.

DATED this 30th day of August 2022.

Richard D. Jones

The Honorable Richard A. Jones  
United States District Judge